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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LOWER PASSAIC RIVER STUDY AREA
COOPERATING PARTIES GROUP,

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY,

Defendant.

HON. JOSE L. LINARES

Civil Action No. 15-CV-7828 (JLL) (JAD)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

In its opposition brief, CPG casts this FOIA lawsuit as an attempt to pry critical information from an agency that has circumvented routine CERCLA procedures to “impose a predetermined remedy” for the Lower Passaic River and steadfastly refused to provide CPG with the information it needs to comment on the agency’s proposed actions. Plaintiff’s Memorandum of Law in Opposition to Motion for Summary Judgment (“Pl. Opp.”) at 1-6.¹ In fact, the EPA has provided extensive information about the remedy selected for the Lower 8.3 Miles of the Lower Passaic River, both in the materials supporting this motion for summary judgment and, more importantly, in the vast administrative record supporting the remedy selection process, which consists of approximately 580 documents prepared or compiled by EPA, including the EPA’s RI/FFS, Proposed Plan, and Record of Decision. *See* Mugdan Decl. ¶ 27. In addition to these materials, the record contains the many comments submitted during the public comment period – including CPG’s own comments – as well as the EPA’s detailed response. *See id.* ¶¶ 23, 26-27.

Viewed against this background, CPG’s broad claims of malfeasance ring hollow. CPG argues that the EPA has engaged in a “strategy of delay, deny, and obstruct,” Pl. Opp. at 5, but it fails to acknowledge the agency’s extensive efforts to respond to CPG’s four FOIA requests or the voluminous number of documents that the agency has produced. Far from obstructing CPG’s access to information about the Lower Passaic River, EPA staff members have expended hundreds of hours to search for, review, and produce documents to CPG. As a result of these efforts, the EPA has identified more than 6,700 potentially responsive documents and produced

¹ For ease of reference, this brief will use the same abbreviations, acronyms, and naming conventions as the EPA’s opening brief.

to CPG more than 4,500 documents (nearly two hundred of which were turned over after a second segregability review). *See id.* ¶¶ 56, 72, 77, 90, 95, 112, 121, 133. Moreover, although CPG vociferously complains that the EPA has failed to provide a document-by-document *Vaughn* index to support its assertion of FOIA exemptions, *see, e.g.*, Pl. Opp. at 9-10, 35-36, 41-42, the detailed categorical *Vaughn* index the EPA provided was agreed upon by the parties to speed the submission of this motion, as memorialized in the joint discovery plan. *See* Joint Discovery Plan (ECF No. 11) at 3. Accordingly, CPG's baseless attacks are insufficient to overcome the good faith accorded to the agency's declarations. For these reasons, and the reasons set forth in the EPA's opening brief, the Court should grant summary judgment to the EPA and dismiss CPG's complaint.

ARGUMENT

THE COURT SHOULD GRANT SUMMARY JUDGMENT TO THE EPA BECAUSE THE AGENCY CONDUCTED A THOROUGH SEARCH AND PROPERLY WITHHELD INFORMATION PURSUANT TO FOIA EXEMPTIONS

A. The EPA Provided a Sufficiently Detailed Categorical *Vaughn* Index in Accordance with the Parties' Joint Discovery Plan

CPG attacks the EPA's decision to submit a categorical *Vaughn* index, arguing that the agency was required to provide additional details about each individual document withheld pursuant to FOIA exemptions and that the EPA should now submit a more detailed *Vaughn* index. *See* Pl. Opp. at 8-14. This argument must be rejected. As CPG admits in its response to the Statement of Material Facts, *see* Plaintiff's Response to Statement of Material Facts ("PRMF") ¶ 130, the parties agreed in their joint discovery plan that the EPA would provide a categorical *Vaughn* index and individual index in light of the large volume of documents at issue in this case. Specifically, the parties agreed that the EPA would provide "(1) an index that

identifies each document withheld in full or in part over the four requests, along with codes for applicable FOIA exemptions; and (2) information describing the different categories of documents withheld in full or in part, and the reasons each category qualifies for withholding under the relevant FOIA exemption(s), either in a separate “index” or incorporated into the agency’s declaration.” Joint Discovery Plan (ECF No. 11), at 3. In accordance with that agreement, the EPA provided exactly what it promised: a 196-page index listing all documents withheld in full or in part, with a column indicating which category and exemption(s) applied to each document, and a 44-page “Coded Key” detailing 18 categories of withheld documents and the reasons that documents in each category qualify for protection under various FOIA exemptions. *See* Mugdan Decl., Ex. X (“*Vaughn* Index”). For CPG to now claim that categorical descriptions are insufficient is patently inconsistent with the parties’ agreement to use a categorical *Vaughn* index in this case.

CPG’s belated objection to a categorical *Vaughn* index is particularly problematic given the interests that the parties’ agreement was designed to address. The EPA could have produced a detailed individual *Vaughn* entry for each of the approximately 2300 documents withheld in part or in full, but it necessarily would have taken much more time than available under the agreed-upon schedule. Had CPG objected to this procedure, they could have raised their objections at the outset of this case, before the EPA spent months categorizing the documents and creating the voluminous categorical *Vaughn* index. Granting CPG the particularized document descriptions it now seeks would essentially force the EPA to start from scratch, scuttling months of effort and defeating the purpose of the parties’ negotiated agreement. Having agreed to a categorical *Vaughn* index, CPG may not now contend that EPA was required to provide a more detailed index.

In any event, even if CPG had not agreed to a categorical *Vaughn* index, the Court should still uphold the EPA's submissions because categorical submissions are appropriate in a FOIA case of this size and complexity. An agency may group documents together as categories in a *Vaughn* index, "particularly when the withholdings comprise multiple, duplicative records and when the government's supporting affidavits are sufficiently detailed to allow the district court fairly to evaluate the application of a claimed exemption to distinct categories of documents." *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 955 F. Supp. 2d 4, 14 (D.D.C. 2013) (citation and quotation marks omitted); *see also Davin v. U.S. Dep't of Justice*, 60 F.3d 1042, 1051 (3d Cir. 1995) (agency may produce a categorical *Vaughn* index containing "specific factual information concerning the documents withheld and correlat[ing] the claimed exemptions to the withheld documents"). "No rule of law precludes [an agency] from treating common documents commonly," *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 147 (D.C. Cir. 2006), and there is no prohibition on using similar or identical language to justify withholding different documents. *Competitive Enterprise Inst. v. EPA*, 12 F. Supp. 3d 100, 115 (D.D.C. 2014). "The alternative, after all, would force agencies to engage in a sort of phony individualization (meaningless variations of language at each invocation of a specific exemption)." *Id.* (citation and quotation marks omitted). Accordingly, courts have upheld the use of a categorical *Vaughn* index where, as here, the agency "describe[s] the categories of information that were withheld under each exemption and the . . . reasoning for the withholding[s]." *Touarsi v. U.S. Dep't of Justice*, 78 F. Supp. 3d 332, 342 (D.D.C. 2015) (noting that the practice of submitting a categorical *Vaughn* index "is regularly accepted by members of [the D.C. district] court" and citing cases).

While CPG attempts to rely on *Davin* as support for its position, that reliance is misplaced. In *Davin*, the FBI submitted a coded *Vaughn* index that provided “generic explanations broad enough to apply to any FOIA request” that were “not tied to the content of the specific redactions” and thus did not “provide the ‘connective tissue’ between the document, the deletion, the exemption[,] and the explanation.” *Davin*, 60 F.3d at 1051 (citation omitted). Here, by contrast, the EPA has not merely submitted “generic explanations broad enough to apply to any FOIA request”: it has provided a list of all withheld documents (approximately 2300 items), as well as a detailed description of eighteen categories into which those documents have been divided that explains why the documents in a specific category fall into one or more FOIA exemptions. For example, rather than merely stating that certain documents in Category 1 are protected by the deliberative process privilege because they are predecisional and deliberative, the EPA’s index describes the specific procedural context in which these documents were created – communications and drafts exchanged between EPA Region 2 and EPA NRRB/CSTAG to develop and review the NRRB/CSTAG Memorandum and Region 2 response – and details the type of deliberative material found in those documents, thus providing the critical context that the Third Circuit found lacking in *Davin*. See *Vaughn* Index, Category 1.² The Court should therefore deny CPG’s request for an individual, document-by-document *Vaughn* index.

² Likewise, despite CPG’s claim that the EPA has failed to provide sufficient information about certain documents because they are only identified by date, see Pl. Opp. at 11-12, the EPA has explained that each of the documents CPG lists is an attachment to an email that was identified on the *Vaughn* index or released to CPG. See Supplemental Declaration of Walter Mugdan (“Suppl. Mugdan Decl.”) ¶ 16. The EPA has correlated the identified attachments with the parent document in a table, attached as part of the Supplement to the Coded *Vaughn* Index. See *id.*, Ex. AA (Supplement to Coded *Vaughn* Index).

B. The EPA's Declarations Properly Document the Reasonableness of Its Search

Contrary to CPG's assertions, the declarations submitted by the EPA demonstrate the reasonableness of its search. An agency is not required to "set forth with meticulous documentation the details of an epic search for the requested records." *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982). Rather, an agency need only offer a "reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials . . . were searched." *Abdelfattah v. Dep't of Homeland Sec.*, 488 F.3d 178, 182 (3d Cir. 2007) (citations omitted). Here, the EPA's submissions provide more than sufficient detail to demonstrate the reasonableness of the agency's search. The Mugdan Declaration describes the extensive search efforts undertaken to respond to CPG's four FOIA requests, explaining, for instance, the search for technical data and information in EPA's possession responsive to the First FOIA Request; the search of email accounts for 16 Region 2 employees (from ERRD, Office of Regional Counsel, and Office of the Regional Administrator), and one Headquarters employee located in Region 2, in response to the First and Second FOIA Requests; the search of email accounts for 14 Region 2 employees (from ERRD, the Public Affairs Division, Office of Regional Counsel, and the Regional Administrator's Office), as well as working files and notes maintained by Region 2 and Public Affairs Division employees, in response to the Third FOIA Request; and EPA's search of Regional Administrator Enck's work email account, and her voluntary search of her personal email account, also in response to the Third FOIA Request. *See* Mugdan Decl. ¶¶ 63-67, 85, 103-107. Far from being "vague and generalized," as CPG claims, Pl. Opp. at 17, the Mugdan Declaration offers the Court more than enough information to assess the agency's efforts and to establish the thoroughness of the

agency's search. *See N'Jai v. U.S. E.P.A.*, No. 13-1212, 2014 WL 2508289, at *12 (W.D. Pa. June 4, 2014).

None of CPG's arguments compels a different conclusion. While CPG alleges that the EPA failed to include "search queries" for the First FOIA Request in the Mugdan declaration, *see* Pl. Opp. at 17, this is incorrect: the EPA described how emails were searched and collected on the basis of date and recipient, without any additional search terms or filters used, and then reviewed by staff for responsiveness. *See id.* Mugdan Decl. ¶ 66.³ CPG is also incorrect when it argues that the EPA needed to provide the name of all individual custodians; because the declaration identifies the offices searched and the searches that were conducted, the names of all individual employees involved in the search were not required. *See Pennsylvania Dep't of Pub. Welfare v. United States*, No. 05-1285, 2006 WL 3792628, at *14 n.28 (W.D. Pa. Dec. 21, 2006). Likewise, despite CPG's suggestion that the EPA drew an "arbitrary" line at 2006 when searching for documents, Pl. Opp. at 17, the agency chose March 31, 2006 as a start date because it was the date that its sub-contractor began work on an analysis that would become part of the models at issue. *See* Suppl. Mugdan Decl. ¶ 3.

Furthermore, although CPG claims that the declaration of Walter Mugdan is insufficient to establish an adequate search because it impermissibly relies on hearsay, *see* Pl. Opp. at 17-19, 20-21, courts routinely hold that an agency may appropriately rely on an affidavit from the agency official responsible for supervising a FOIA search, even though that official "necessarily relie[s] upon information provided by staff members who actually performed [the] search[.]" *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) (citation omitted); *see also*

³ Because subparts in CPG's requests sought specific items, the EPA was able to locate particular documents in EPA files or in the public record without running an electronic search.

Dugan v. Dep't of Justice, 82 F. Supp. 3d 485, 496-497 (D.D.C. 2015); *Lewis v. U.S. E.P.A.*, No. 06-2660, 2006 WL 3227787, at *2-3 (E.D. Pa. Nov. 3, 2006). In this case, the EPA has submitted an affidavit from the Director of ERRD, Region 2, Walter Mugdan, the official charged with supervising responses to FOIA requests (like CPG's) that seek information related to ERRD's responsibilities. *See* Mugdan Decl. ¶ 3. Because Mugdan supervised the processing of CPG's FOIA requests and the employees who conducted the searches for responsive documents, there is no basis for CPG to attack the competence or admissibility of his declaration.

CPG next argues that the EPA failed to perform an adequate search because it did not turn over certain emails from the personal email account of Regional Administrator Judith Enck and did not search the private email accounts of other employees. *See* Pl. Opp. at 19-24. These contentions must be rejected. An agency responding to a FOIA request is "under no obligation to search every system of records which might conceivably hold responsive records," *Truesdale v. U.S. Dep't of Justice*, 803 F. Supp. 2d 44, 51 (D.D.C. 2011); so long as the agency's search is "reasonably calculated to uncover all relevant documents," *Abdelfattah*, 488 F.3d at 182 (citation omitted), it will be upheld. In light of this standard, courts assessing the adequacy of a FOIA search focus on the methods, not the fruits, of an agency's search efforts. *See Qatanani v. Dep't of Justice*, Nos. 12-4042 (KSH) (CLW), 12-5379 (KSH)(CLW), 2015 WL 1472227, at *7 (D.N.J. Mar. 31, 2015) (quoting *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003)). Moreover, agency declarations in FOIA cases "are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Servs.*, 926 F.2d at 1200 (citation and quotation marks omitted). Mere speculation by CPG regarding additional responsive documents does not invalidate the EPA's search.

Here, assuming *arguendo* that the EPA has the authority (and ability) under FOIA to conduct searches of personal email accounts of lower-level employees,⁴ there is no indication that emails in other employees' personal email accounts are responsive agency records, or that such emails would not come up in the search of work email accounts that EPA conducted. CPG claims (citing news articles and op-eds about unrelated matters) that "multiple EPA officials . . . used personal email accounts for official business," Pl. Opp. at 23. But a review of the EPA's *Vaughn* indices and the documents identified by CPG shows that, out of over 6,700 documents from a nearly-decade long period (2006-2014), sixteen records contained a "personal email address," only two of which belonged to EPA personnel – one, dated 2007, from an EPA employee to herself, and one, sent in 2014, from an EPA employee to his home and work accounts during a snow closure. *See* Suppl. Mugdan Decl. ¶ 6. This hardly demonstrates the widespread use of personal email that the CPG alleges, and does not create a basis for EPA to canvass employees' personal email accounts for potential agency records.⁵

⁴ No court to our knowledge has ever held that an agency must itself search the private email account of one of its employees. The D.C. Circuit recently held that, "[i]f an agency head controls what would otherwise be an agency record, then it is still an agency record and still must be searched or produced." *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, __ F.3d __, 2016 WL 3606551 at *4 (D.C. Cir. Jul. 5, 2016). But the *CEI* decision only addressed the narrow question whether work-related emails on a nongovernmental email account can be within the agency's custody and control such that they are "withheld" by the agency under FOIA. The court did not address whether the emails at issue were "agency records," nor did it address the standards governing the adequacy of an agency's search or suggest that an agency itself must search employees' personal email accounts.

⁵ The district court's decision in *Landmark Legal Foundation v. EPA*, 959 F. Supp. 2d 175 (D.D.C. 2013), on which CPG relies, does not compel a different finding. While the court allowed discovery regarding the EPA's search, the agency in that case did not search the personal email accounts of any EPA personnel, and did not originally produce any records from certain high-ranking officials – circumstances that are not present in this case. *See id.* at 181-82.

On the other hand, when the CPG specifically asked the agency to search a personal email account, the EPA did so. The EPA asked Regional Administrator Enck to search her personal email account for documents responsive to the Third FOIA request, which sought “[a]ny and all communications regarding the Lower Passaic River Study Area between any member of the public and Judith Enck . . . [which] would include but not be limited to . . . email (both official accounts and personal accounts used for official business)[.]”⁶ Mugdan Decl. ¶ 104; Declaration of Judith Enck (“Enck Decl.”) ¶ 3. Although it was her general practice to forward any email received at her personal email account that is related to official government business to her official EPA email account, Regional Administrator Enck nonetheless searched her private email account but did not find any email that comprised communications between members of the public and her regarding the Lower Passaic River Study Area. *See id.* ¶ 6. The June 12, 2011, “Hudson River PCBs” email exchange with an individual in California (*see* Declaration of William Hyatt, Jr. (“Hyatt Decl.”), Ex. J), was not responsive to the FOIA request because the Passaic River was mentioned only in passing and was not the subject of the email. *See* Enck Decl. ¶ 7. Two other emails that mention Passaic – the July 16, 2010 email exchange with Walter Mugdan (Hyatt Decl., Ex. J), and a separate June 9, 2011 email exchange with other EPA employees – are not responsive because they are not communications between her and a member of the public about the Lower Passaic River Study Area. *See id.* ¶ 6 & Ex. 1 (June 9, 2011 email). These non-responsive emails do not undermine the accuracy of the EPA’s original

⁶ The EPA did not ask Regional Administrator Enck to personally search her work email because it used eDiscovery software to run a search for responsive documents in her work email account, as well as the accounts of other Region 2 employees likely to have responsive documents. *See* Mugdan Decl. ¶¶ 103-04. This search turned up the three emails described above, and the agency determined that they were not responsive to the Third FOIA request. *See* Enck Decl. ¶¶ 6-7. Contrary to CPG’s claim, Regional Administrator Enck was not “exempted” from the eDiscovery search.

Mugdan Declaration or the reasonableness of the Regional Administrator's search. Accordingly, they provide no basis for the Court to allow CPG discovery or invalidate the EPA's search.⁷

C. The EPA Properly Withheld Documents and Information Under FOIA Exemptions

As discussed in detail in its moving brief and supporting declarations, the EPA has properly asserted Exemptions 5, 6, and 7(A) over approximately 2,300 responsive documents. For the reasons explained in the EPA's submissions, and as set forth more fully below, CPG's arguments do not provide any basis to deny summary judgment.

1. The EPA Properly Withheld Documents Under Exemption 5

CPG does not dispute that documents withheld under Exemption 5 qualify as inter-agency or intra-agency communications, but rather argues that the EPA's declaration and *Vaughn* index are insufficient to establish that the documents qualify for protection under the deliberative process, attorney-client, and work product privileges. *See* Pl. Opp. at 24-31. Each privilege is discussed in turn.

a. Deliberative Process Privilege

CPG argues that the EPA cannot invoke the deliberative process privilege because the agency has offered "only conclusory statements to the effect that information is exempt simply because it is discussed internally." Pl. Opp at 25. This claim is meritless. The EPA has not merely offered conclusory statements; rather, it has detailed the development of the CSM, EMBM, the RI/FFS, the Proposed Plan, and the Record of Decision, *see* Mugdan Decl. ¶¶ 10,

⁷ Regional Administrator Enck's declaration also provides further detail concerning the search she conducted of her paper files. *See* Enck Decl. ¶¶ 4, 7, 8. CPG's speculation that additional, responsive documents might exist in these files is insufficient to rebut the EPA's declarations. A FOIA search is judged by the reasonableness of the methods used, not the fruits of the search, *see Iturralde*, 315 F.3d at 315, and EPA produced documents from the search of Regional Administrator Enck's paper files.

21-29, 31-54, described the content of each category of withheld documents, *see Vaughn* Index, Categories 1-18, and explained why documents in each relevant category were pre-decisional and deliberative, *see id.* These explanations are sufficient to justify withholding under Exemption 5.

CPG's next assertion – that the EPA improperly asserted the deliberative process privilege over post-decisional CSM and EMBM documents – is similarly unavailing. Despite CPG's statement that these documents “were released in June 2008,” Pl. Opp. at 27, draft versions of the CSM and EMBM were actually released in June 2007 for public comment; May 2008 drafts submitted to peer reviewers were not publicly released. *See* Suppl. Mugdan Decl. ¶ 12. To address the public comments received, as well as comments received from peer reviewers, the EPA continued to develop the draft CSM and EMBM by incorporating new analyses, significantly restructuring the models, and re-writing large sections before the final versions were released as appendices to the RI/FFS in April 2014. *See id.* ¶ 13. Accordingly, drafts and comments that predate the final, April 2014 version of the CSM and EMBM – such as those listed at page 27-28 of CPG's opposition – were properly withheld under the deliberative process privilege.

Furthermore, to the extent that any portions of the withheld drafts were eventually incorporated into final documents, the EPA is not required to cull through each draft and release the portions that made it into the final, publicly available versions of those documents. Compelling an agency “to identify differences between drafts and final versions would undermine the protection afforded by the deliberative process privilege, as it would grant requesters the right to review agency employees' suggestions that are then rejected in favor of alternatives.” *Soghoian v. Office of Mgmt. & Budget*, 932 F. Supp. 2d 167, 183-84 (D.D.C.

2013); *see also Lead Indus. Ass'n v. Occupational Safety & Health Admin.*, 610 F.2d 70, 86 (2d Cir. 1979) (“If the segment appeared in the final version, it is already on the public record and need not be disclosed. If the segment did not appear in the final version, its omission reveals an agency deliberative process”). Because such an effort would necessarily “expose what occurred in the deliberative process between the draft’s creation and the final document’s issuance,” *Reliant Energy Power Generation, Inc. v. FERC*, 520 F. Supp. 2d 194, 204 (D.D.C. 2007) (citation omitted), the EPA properly invoked Exemption 5 over all draft information. *See Soghoian*, 932 F. Supp. 2d at 184 (holding that agency “need not review its withholdings and disclose all draft information ultimately incorporated in some way into the final [documents]”).

Finally, as the EPA has argued more fully in its opening brief and *infra* at Point E, it has released all reasonably segregable non-exempt material. The documents cited by CPG (*see* Pl. Opp. at 29-30), several of which bear the word “draft” in their subject line, are not purely factual in nature. *See* Suppl. Mugdan Decl. ¶ 15. The presence of a fact, or the word “fact” in the title of a document does not imply that the document is simply an assemblage of facts: for example, a “fact sheet” shared within EPA (and with its partner agencies) will include information prepared by staff to explain opinions and advice on matters under consideration by the EPA. *See id.* Discussions of technical analyses, such as modeling and regression analysis, while scientific in nature, are also part of EPA’s internal discussions as part of its decision-making process. *See id.* Because any factual material in these documents was inextricably intertwined with privileged, deliberative information, the EPA properly withheld these documents.

b. Attorney-Client Privilege

CPG also contends that the EPA has improperly withheld documents under the attorney-client privilege, claiming that “the subject matter identified is so general it is impossible to tell

whether the communication sought or provided legal advice.” Pl. Opp. at 32. But the EPA has not merely provided the “subject matter” of the attorney-client privileged information, it has described the context and nature of the advice provided by attorneys, explaining, for instance, that documents in Category 1 contained “memoranda and other documents written by technical staff with comment and advice from Region 2 attorneys,” which “were prepared to support the issuance of the Proposed Plan and Record of Decision, and to finalize and incorporate Agency advice on the Technical Memorandum and response,” and “incorporate legal advice from EPA attorneys to program staff and managers concerning the interpretation of CERCLA and its implementing regulations and guidance.” *Vaughn* Index, Category 1. Thus, contrary to CPG’s assertion, the withheld materials do not qualify as the kind of working “agency law” found subject to disclosure in *Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir. 1997). *See Touarsi*, 78 F. Supp. 3d at 345 (upholding application of attorney-client privilege to “communications related to a specific investigation and potential prosecution” because they were not “merely authoritative interpretations of agency law”).

As for CPG’s remaining claims that the EPA has failed to specifically identify attorneys or demonstrate the confidential nature of withheld documents, *see* Pl. Opp. at 13, 32, the EPA has explained that the documents withheld pursuant to the attorney-client privilege contained “confidential communications exchanged among Region 2 staff and legal counsel within the Region, and with legal counsel in EPA-HQ,” as well as documents “exchanged between non-legal personnel, reflecting legal advice,” and that “[t]he substance of these communications has been kept confidential.” Mugdan Decl. ¶ 142; *see also* Suppl. Mugdan. Decl. ¶ 11. Moreover, the EPA has furnished the names of attorneys named in the withheld documents, which provide further support for the agency’s assertion of the attorney-client privilege. *See id.*, Ex. AA

(Supplement to Coded *Vaughn*). For these reasons, as well as the reasons more fully set forth in EPA's supporting declarations, the EPA has properly asserted Exemption 5 over attorney-client privileged documents.

c. Attorney Work Product Privilege

As its final attack on the EPA's assertion of Exemption 5, CPG claims that the agency has failed to identify a "specific claim or impending litigation" that relates to the documents withheld under the attorney work product privilege. This claim is unavailing. Where, as here, "government attorneys act as 'legal advisors' to an agency considering litigation that may arise from challenge to a government program, a specific claim is not required to justify the assertion of [the attorney work-product] privilege." *Media Research Ctr. v. DOJ*, 818 F. Supp. 2d 131, 141 (D.D.C. 2011) (quoting *In re Sealed Case*, 146 F.3d 881, 887 (D.C. Cir. 1998)); *see also Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992), *abrogated on other grounds by Milner v. Dep't of Navy*, 562 U.S. 562 (2011). Accordingly, the EPA is not required to show that an existing, "actual litigation . . . was the focus of the withheld documents." Pl. Opp. at 33. In any event, as the EPA has explained, the agency has reasonably anticipated litigation concerning the Lower 8.3 Miles given the significant projected clean-up costs and the litigation that has already ensued in federal and bankruptcy court. *See* Defendant's Memorandum of Law in Support of Motion for Summary Judgment ("Def. Br.") at 27 (citing Mugdan Decl. ¶ 143); *see also* Suppl. Mugdan Decl. ¶ 14. The Court should therefore uphold the EPA's invocation of the attorney work product privilege under Exemption 5. *See, e.g., Elec. Privacy Info. Ctr. v. U.S. Drug Enf't Agency*, No. 14-317 (EGS), 2016 WL 3557007, at *9 (D.D.C. Jun. 24, 2016) (upholding attorney work product privilege because it was "objectively reasonable for the government agencies involved to hold a subjective belief that litigation was and is a real possibility").

2. The EPA Properly Withheld Information Under Exemption 6

CPG next objects to the EPA's invocation of Exemption 6 over personally-identifying information of EPA employees, other federal employees, and members of the public, as well as emails containing medical information and other personal details. *See* Pl. Opp. at 34-36. In so arguing, CPG does not actually suggest that the withheld information – which includes home addresses, cell phone numbers, and details of doctor's appointments, child care, and other uses of personal time – falls outside the protection of Exemption 6. Nor does CPG argue that disclosure of this information would serve the only interest relevant to Exemption 6 analysis: the extent to which release would improve public understanding of agency operations. Rather, CPG argues that the EPA has failed to provide sufficiently detailed descriptions of the withheld information.

The EPA's submissions provide sufficient detail about the information withheld under Exemption 6 to justify the EPA's assertion of this exemption.⁸ *See Vaughn Index*, Category 5 (“personal information such as discussions of child-care, vacation, and other use of personal time or leave”); Category 9 (same); Category 11 (same); Category 17 (personal email addresses, cell phone, numbers, home phone numbers, home addresses, conference call-in lines and access codes, and similar contact information); Suppl. *Vaughn Index*, Category 4 (“personal information such as discussions of retirement, vacation, and other use of personal time or leave”); Category 12 (“personal information such as discussions of family, vacation, and other use of personal time or leave”). The Court should therefore uphold the EPA's decision to withhold this information under Exemption 6. *See* Def. Br. at 32 (citing cases).

⁸ CPG is correct that the EPA inadvertently failed to address Exemption 6-protected information in two categories of withheld documents, Category 4 and Category 12. The EPA, however, has now corrected this oversight in the Supplement to its *Vaughn Index* submitted as Exhibit AA to the Supplemental Mugdan Declaration. *See* Suppl. *Vaughn Index*, Category 4 and Category 12.

3. The EPA Properly Withheld Documents and Information Under Exemption 7(A)

CPG next challenges the EPA's assertion of Exemption 7(A), arguing that (1) the documents were not compiled for law enforcement purposes; (2) there is no pending or prospective law enforcement proceeding; and (3) the EPA has failed to demonstrate that disclosure would cause "articulable harm." Pl. Opp. at 36-44. None of these claims has any merit.

To begin, CPG overlooks the applicable standard for establishing that records were compiled for law enforcement purposes under Exemption 7. In the Third Circuit, an agency seeking to apply Exemption 7 "does not have to identify a particular individual or incident as the object of an investigation into a potential violation of law or security risk"; it need only show "that the relationship between its authority to enforce a statute or regulation and the activity giving rise to the requested documents is based upon information sufficient to support at least a colorable claim of the relationship's rationality." *Abdelfattah*, 488 F.3d at 185-186. CPG cites dicta in *Davin* as support for its argument that "an agency whose principal function is not law enforcement" bears a higher burden to show that records were compiled for law enforcement purposes under Exemption 7. Pl. Opp. at 38 (citing *Davin*, 60 F.3d at 1054 n.3). However, *Abdelfattah* modified the Exemption 7 test announced in *Davin*, see *Abdelfattah*, 488 F.3d at 181, 185-86, and no Third Circuit decision has followed the dicta contained in *Davin*'s footnote 3 on this issue. Accordingly, this Court need not accord less deference to the EPA than to an agency whose primary purpose is law enforcement.

Even if the Court applied a less deferential test to the EPA, it should still find that the EPA has satisfied Exemption 7's threshold requirement. The EPA has explained that this small subset of documents was compiled as part of the agency's efforts to enforce CERCLA with

respect to the 17 Miles and Lower 8.3 Miles, and that these records were therefore compiled “for law enforcement purposes.”⁹ *See* Mugdan Decl. ¶ 144. In contrast to the agency at issue in *Abdelfattah*, the EPA’s declaration “identifie[s a] connection between its law enforcement authority and the information contained in the withheld material.” *Abdelfattah*, 488 F.3d at 186. Because this information “support[s] at least a colorable claim of the relationship’s rationality,” *id.*, the EPA has met its burden.

CPG’s allegations do not alter this conclusion. Notably, CPG does not dispute that Exemption 7 extends to enforcement of civil, as well as criminal laws; that the EPA performs a law enforcement function under CERCLA; or that cases have upheld the application of Exemption 7 protection to EPA records. *See* Def. Br. at 33-34 (citing cases). Instead, their objection rests on their speculation that, because some of the withheld documents “concern[]” technical information, this “reveals” that they were not originally compiled for a law enforcement purpose. Pl. Opp. at 39. This conjecture, however, is insufficient to rebut the good faith accorded to the EPA’s declarations. Moreover, even if CPG’s allegations could establish that records were not originally created for a law enforcement purpose, this would not defeat the EPA’s assertion of Exemption 7. As the Supreme Court has held, records that are not originally gathered for an investigation may still be considered “compiled for law enforcement purposes” if they later become part of the agency’s investigation. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 155 (1989).

CPG’s next set of objections, which focus on the specific Exemption 7(A) elements, are also unpersuasive. An agency invoking Exemption 7(A) must show that “(1) a law enforcement

⁹ While CPG cites the number as 56, the total is 94 documents. *See Vaughn Index*, Categories 8, 9, 10, 11, 12, 15, 18.

proceeding is pending or prospective and (2) release of the information could reasonably be expected to cause some articulable harm.” *Manna v. U.S. Dep’t of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995). CPG argues that the EPA has improperly invoked Exemption 7(A) because it has not initiated any “relevant enforcement actions” since the withheld documents were created, unlike two of the cases cited in the agency’s brief, which involved FOIA requests submitted after the EPA had filed unilateral administrative orders. *See* Pl. Opp. at 40 (citing *Goodrich Corp. v. U.S. E.P.A.*, 593 F. Supp. 2d 184, 193 (D.D.C. 2009); *Gen. Elec. Co. v. U.S. E.P.A.*, 18 F. Supp. 2d 138, 144 (D. Mass. 1998)). CPG’s argument, however, eliminates the word “prospective” from the “pending or prospective” requirement. Exemption 7(A) is not limited to situations where an enforcement proceeding is already “pending”; to the contrary, both the Third Circuit and the D.C. Circuit have held that the exemption may apply before proceedings have commenced. *See Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1114 (D.C. Cir. 2007) (“enforcement proceedings need not be currently ongoing; it suffices for them to be ‘reasonably anticipated’”); *Manna*, 51 F.3d at 1165 (upholding application of Exemption 7(A) in case where “prospective criminal or civil . . . proceedings [we]re contemplated”).

Here, there have been numerous actions involving cleanup of the Lower Passaic River, including a case brought by NJDEP against responsible parties and seven bankruptcy proceedings in which the EPA has sought to recover CERCLA response costs. *See* Mugdan Decl. ¶ 144; Suppl. Mugdan Decl. ¶ 7. Given this long history of litigation, the EPA has reasonably anticipated that it may need to undertake enforcement, including litigation, to bring about the cleanup of the 17 Miles and/or the Lower 8.3 Miles. *See* Mugdan Decl. ¶ 144; Suppl. Mugdan Decl. ¶ 7. While CPG suggests that applying Exemption 7(A) here would permit the EPA to withhold “every document related to a CERCLA-site cleanup,” Pl. Opp. at 41, that

argument is belied by the limited number of documents over which EPA has claimed Exemption 7(A) protection. If the EPA took the view that Exemption 7(A) “encompass[es] every document created in relation to a CERCLA site,” *id.*, it would not have invoked Exemption 7(A) over only 94 of more than 6,000 responsive documents. The Court should therefore reject CPG’s attack on this ground.

CPG’s remaining contentions also lack merit. Contrary to CPG’s suggestion, Exemption 7(A) does not only apply when disclosure could “intimidate witnesses or destroy evidence.” Pl. Opp. at 43. Rather, agencies may properly invoke this exemption to prevent a wide variety of harms, including the harm that will result from giving a requester “advance access” to the government’s case, or allowing a “suspected violator” to “construct defenses which would permit violations to go unremedied.” *NLRB v. Robbins Tire & Rubber Corp.*, 437 U.S. 214, 241 (1978) (citations omitted). Indeed, the Supreme Court has noted that Congress enacted Exemption 7(A) because it “recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or *placed at a disadvantage* when it came time to present their cases” in court. *Id.* at 224 (emphasis added).

As the EPA detailed in the Mugdan Declaration, affording CPG access to the withheld documents would put the EPA at a disadvantage by revealing (a) the agency’s thoughts and mental impressions about the enforcement case; (b) the facts that EPA thought were significant (or insignificant) and the judgments EPA staff applied to reach their conclusions; and (c) EPA’s assessment of the strengths and weaknesses of its preliminary determinations with respect to the remedy selection process, and thus its internal assessment of its litigation risk. *See* Mugdan Decl. ¶ 145. The EPA further explained that the knowledge and insight provided by these

documents could enable CPG and other PRPs to devise litigation and/or enforcement avoidance strategies to counter EPA's enforcement effort and impair EPA's ability to ultimately present its enforcement case. *See id.* This determination is well-supported by the many decisions that have invoked Exemption 7(A) in similar circumstances. *See* Def. Br. at 37-38 (citing cases). To the extent the district court in *Goodrich*, 93 F. Supp. 2d at 195, reached a different conclusion, that decision – which cites to no authority on this issue – should not be followed by this Court.

Finally, CPG's contention that EPA improperly considered its identity as a consortium of PRPs overlooks the Third Circuit's decision in *Manna*, which directly undercuts their argument. *See Manna*, 51 F.3d at 1164 (under Exemption 7(A), "a court may also take into consideration the requestor's identity" when determining whether the release of information could reasonably be expected to interfere with enforcement proceedings). CPG's reliance on a D.C. district court case in the face of this precedent is therefore misplaced.

D. The EPA Produced All Reasonably Segregable Information to CPG

Despite CPG's claim that the EPA provided "wholly conclusory" assertions regarding its segregability review (*see* Pl. Opp. at 14-15), the Mugdan Declaration demonstrates that the EPA produced all reasonably segregable information. Unlike the declaration found insufficient in *Abdelfattah*, 488 F.3d at 186-87, the EPA has explained its segregability process, describing the line-by-line segregability review performed by Region 2 staff and the second level of review performed by EPA's Office of General Counsel, and explaining that, after the second review, EPA determined that an additional 193 documents could be released in whole or in part. *See* Mugdan Decl. ¶¶ 71-72, 90-91, 111-12, 136. In addition, the EPA has explained that withheld materials were not reasonably segregable because factual information in the withheld documents

was inextricably intertwined with attorney-client information, attorney work product, and predecisional, deliberative information. *See Vaughn* Index, Categories 1-18.

The burden of conducting a line-by-line review must be weighed against “the usefulness of the disclosures to the requester.” *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 892 F. Supp. 2d 28, 43 (D.D.C. 2012). In this case, the EPA chose to undertake an initial line-by-line review – as well as a second level of review by the Office of General Counsel – out of an abundance of care. These efforts satisfied the EPA’s FOIA obligations. *See Sack v. CIA*, 49 F. Supp. 3d 15, 23 (D.D.C. 2014); *Schoenman v. FBI*, 841 F. Supp. 2d 69, 84-85 (D.D.C. 2012).

E. The CPG Is Not Entitled to Discovery in this FOIA Suit

Finally, the Court should deny CPG’s request for discovery. As an initial matter, CPG’s request should be rejected because it has not supported its request for discovery with an appropriate affidavit. Pursuant to Fed. R. Civ. P. 56(d), a party who opposes summary judgment on the ground that discovery is necessary must “submit an affidavit specifying, for example, what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained.” *Pennsylvania, Dep’t of Pub. Welfare v. Sebelius*, 674 F.3d 139, 157 (3d Cir. 2012) (citation omitted). “A party’s failure to file a Rule 56[(d)] affidavit is fatal to his claim of insufficient discovery.”¹⁰ *N’Jai*, 2014 WL 2508289, at *4 n.5 (citation and quotation marks omitted). Here, although CPG invokes Rule 56(d) in their opposition brief, *see* Pl. Opp. at 44, it has failed to submit a declaration addressing the issues specified in Rule 56(d). Accordingly, the Court may deny the request for discovery on this basis.

¹⁰ In 2010, Rule 56 was amended and the provisions of former subdivision (f) were “carrie[d] forward without substantial change” to current subdivision (d). Fed. R. Civ. P. 56, Advisory Committee’s note (2010); *Shelton v. Bledsoe*, 775 F.3d 554, 567 (3d Cir. 2015). Accordingly, cases like *N’jai* that address the pre-2010 version of Rule 56 cite Rule 56(f) rather than Rule 56(d).

Even if this Court were to overlook CPG's non-compliance, it should deny CPG's request for discovery because its allegations are insufficient to warrant this exceptional remedy. Discovery is "rare" and "generally disfavored" in FOIA actions, *Bartko v. United States Dep't of Justice*, No. 13-1135 (JEB), 2016 WL 829967, at *12 (D.D.C. Mar. 3, 2016) (citing cases), and courts are reluctant to order such "extraordinary" relief. *Thomas v. FDA*, 587 F. Supp. 2d 114, 115 (D.D.C. 2008); *see also Schrecker v. Dep't of Justice*, 217 F. Supp. 2d 29, 35 (D.D.C. 2002) ("Discovery in FOIA is rare and should be denied where an agency's declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains."), *cited with approval by Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006). Although courts have allowed limited discovery in isolated cases where there was "evidence of some wrongdoing" in the FOIA process, *Citizens For Responsibility & Ethics in Washington v. Nat'l Indian Gaming Comm'n*, 467 F. Supp. 2d 40, 56 (D.D.C. 2006), speculative claims are insufficient to rebut the presumption of good faith that attaches to agency declarations, and therefore insufficient to warrant discovery. *SafeCard Servs.*, 926 F.2d at 1201; *Voinche v. F.B.I.*, 412 F. Supp. 2d 60, 72 (D.D.C. 2006). Indeed, even in cases "[w]here an agency's declarations are insufficient to support a finding that its search was adequate, courts generally will request that an agency supplement its supporting declarations rather than order discovery." *Wolf v. CIA*, 569 F. Supp. 2d 1, 10 (D.D.C. 2008) (internal citations and quotation marks omitted).

In this case, CPG appears to seek discovery on the EPA's search as well as possibly other, unenumerated issues, *see* Pl. Opp. at 6, but none of its allegations provides any basis for the Court to allow discovery. While CPG "disputes" the vast majority of facts in the EPA's Local Civil Rule 56.1 statement, *see, e.g.,* PRMF ¶¶ 1-27 (disputing that paragraphs "state[] a

material fact”), 30-33 (stating that CPG is “without information sufficient to form a belief as to the truth” of assertions in paragraphs, and “therefore, disputes” them), they do not cite any evidence to contradict these paragraphs, and thus cannot establish a need for discovery based on these responses. Even in the single instance where CPG does cite record support to dispute one of the EPA’s facts (§ 103, relating to the search of Regional Administrator Enck’s personal email account), those allegations are insufficient to warrant discovery. As explained above and in the Enck Declaration, Regional Administrator Enck voluntarily searched her personal email account and did not find any communications between her and the public about the Lower Passaic River; the two emails CPG cites in their motion were not responsive to the Third FOIA Request because they did not fall into this category of documents. At any rate, CPG’s insinuation that these documents are responsive due solely to the word “Passaic” is insufficient to rebut the good faith accorded to the EPA’s declarations. *See Leopold v. Dep’t of Justice*, 130 F. Supp. 3d 32, 42 (D.D.C. 2015).

CPG’s remaining allegations are similarly insufficient. The unrelated articles, editorials and decisions cited by CPG in the introduction of its brief (*see* Pl. Opp. at 4-5) have no bearing on how the EPA handled the CPG’s four FOIA requests. CPG’s implication that similar conduct could have happened here amounts to mere conjecture that cannot rebut the presumption of good faith or otherwise justify discovery. *Cf. Friedman v. U.S. Secret Serv.*, 923 F. Supp. 2d 262, 275 (D.D.C. 2013) (“plaintiff’s conjecture as to covert activity within the agency to prevent FOIA disclosures does not rebut the presumption”); *Skurow v. U.S. Dep’t of Homeland Sec.*, 892 F. Supp. 2d 319, 327 (D.D.C. 2012) (“purely speculative claims about the agencies’ motives” in responding to FOIA request insufficient to rebut presumption of good faith). This is particularly

true when an agency has made multiple good faith efforts to respond to the FOIA requests before the filing of any litigation, as the EPA has done here.

In sum, CPG has failed to demonstrate that this is the rare and exceptional FOIA case where discovery would be appropriate. Should the Court determine that additional information regarding the EPA's search or withholdings are necessary, it should allow the EPA to provide a supplemental declaration or *Vaughn* index, or produce documents for in camera review.

CONCLUSION

For all of the foregoing reasons, and the reasons set forth in the EPA's opening brief, the Court should grant summary judgment to the EPA and dismiss the complaint in all respects.

Dated: Newark, New Jersey
July 15, 2016

PAUL J. FISHMAN
United States Attorney

By: s/Kristin L. Vassallo
KRISTIN L. VASSALLO
Assistant United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LOWER PASSAIC RIVER STUDY AREA)
COOPERATING PARTIES GROUP,)

Plaintiff,)

v.)

Case No. 15-CV-7828 (JLL)(JAD)

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)

Defendant.)

DECLARATION OF JUDITH ENCK

I, Judith Enck, under penalty of perjury, affirm and declare that the following statements are true and correct to the best of my knowledge and belief and are based on my own personal knowledge, or on information supplied to me by U.S. Environmental Protection Agency (EPA) employees under my supervision.

1. I am the Regional Administrator of EPA, Region 2 (Region 2). I have held this position since November 5, 2009. As Regional Administrator, I administer federal programs governing air and water pollution, industrial discharges, toxic substances, pesticides, protection of streams, lakes and the ocean, solid and hazardous wastes, and the cleanup of chemical spills and abandoned hazardous waste sites in cooperation with state and regional authorities in New Jersey, New York, Puerto Rico, U.S. Virgin Islands and eight federally recognized Indian Nations. I am responsible for EPA's Region 2 office, which includes approximately 900 employees, with an annual budget of approximately \$700 million.

2. The purpose of this declaration is to describe my search for information responsive to

Freedom of Information Act (FOIA) Request EPA-R2-2014-006476, submitted by Robert La Gravenis on behalf of the Lower Passaic River Cooperating Parties Group (CPG) on May 14, 2014. The FOIA request relates to the Diamond Alkali Superfund Site, and specifically, to the remedy selection process for the lower 8.3 miles of the Lower Passaic River.

3. On May 21, 2014, Alice Yeh sent me an email informing me of the CPG's FOIA request, which requested: "Any and all communications regarding the Lower Passaic River Study Area between any member of the public and Judith Enck, including any alter egos or aliases of Administrator Enck. This information would include but not be limited to all letters, email (both official accounts and personal accounts used for official business), and any notes, records, reports, summaries or memoranda taken during or prepared after communications with members of the public relating to the [Lower Passaic River Study Area (LPRSA)]." In her email, Alice Yeh informed me that Region 2 would use EPA's eDiscovery software to search my work email account, so I would not have to do so myself. Alice Yeh further requested that I search through all of the other communication methods listed above (personal emails used for official business, letters, notes, memos, etc.) for information responsive to this FOIA request.

4. To undertake the search for communications between members of the public and me regarding the Lower Passaic River Study Area, I asked one of my staff to retrieve my paper files for the Lower Passaic River for my review. My office maintains paper working files by subject matter. When I receive a letter or other hard copy document relating to a particular case or issue, I provide the document to my staff to file in the corresponding subject matter file folder. Additionally, letters or memoranda signed by me are filed by date in a separate file. Between May 21 and June 10, 2014, my executive assistant and special assistant searched my paper files for communications regarding the Lower Passaic River Study Area between any member of the

public and me, including any notes, records, reports, summaries or memoranda, which I then reviewed. As a result of this search, my staff and I located communications with members of the public regarding the Lower Passaic River Study Area in my paper working file. I gave these paper documents to Steve Carrea, my Special Assistant, to provide to Alice Yeh.

5. In the past, I have forwarded information related to government business from my personal account to my official EPA email account for FOIA and recordkeeping purposes. It is my current practice to avoid using my personal email account for government business. If I receive an email that relates to EPA business on my personal email account, it is my general practice to forward that email from my personal email account to my official EPA email account. Nevertheless, to address the portion of the CPG's FOIA request that specifically requested a search of my personal account, in May 2014, I voluntarily searched my personal email account for records potentially responsive to this FOIA request. In my search of my personal email account, I did not find any email that comprised communications between members of the public and me regarding the Lower Passaic River Study Area. To the best of my recollection, the word "Passaic" appeared a few times in my search, but not in the context of a communication with a member of the public regarding the Lower Passaic River Study Area, which is the focus of the CPG's FOIA request.

6. I have reviewed the two emails that included the word "Passaic" that were attached as Exhibit J to the Affidavit of William Hyatt, Jr. The first, dated June 12, 2011, with the subject line "Hudson River PCBs," was between me and an individual in California, and is not responsive to the FOIA request at issue in this case because it is about the Hudson River, not the Passaic. The other email attached as Exhibit J is a June 16, 2010, email exchange between me and Walter Mugdan. The portion of the email chain that includes a communication with a

member of the public was not about the Lower Passaic River Study Area. In addition to these two examples, I am also aware of a June 9, 2011, email that included the word Passaic, but which, in my view, is not responsive to the CPG's FOIA request because it was not a communication between a member of the public and me. A copy of the June 9, 2011, email is attached as Exhibit 1.

7. I previously forwarded the emails described above to my EPA account from my personal account. My staff has informed me that these same three emails were also collected as part of the search of my EPA account, which was done using the Agency's eDiscovery tools. These emails were independently reviewed and determined to be non-responsive to the CPG's FOIA request by staff in the course of reviewing communications received from my EPA account.

8. On or about May 12, 2016, in response to an inquiry from the Region 2 Office of Regional Counsel, I confirmed that I (by which I meant my staff under my direction and I) had searched my paper files, including letters, notes, records, reports, summaries and memoranda, and my personal email account, for information responsive to the CPG's FOIA Request. I also confirmed that I did not use my personal email account for communications regarding the Lower Passaic River Study Area with any members of the public.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on July 11, 2016.

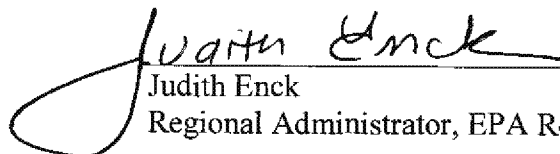

Judith Enck
Regional Administrator, EPA Region 2

EXHIBIT 1

Exemption 6

From: [REDACTED]
To: Enck, Judith
Subject: Fwd: for today's call with administrator Jackson
Date: Thursday, December 19, 2011 3:05:25 PM

Exemption 6

-----Original Message-----

From: [REDACTED]
To: dubin.noah <dubin.noah@epa.gov>; stroman.gladys <stroman.gladys@epa.gov>; perclasepe.bob <perclasepe.bob@epa.gov>; thompson.diane <thompson.diane@epa.gov>
Sent: Thu, Jun 9, 2011 9:09 pm
Subject: for today's call with administrator Jackson

gladys or Noah: Judith Enck from region 2 here. Please print this email and give it to administrator Jackson prior to my afternoon call with her. I think it will help save time on the call. thanks!

Judith Enck Region 2 Priorities:

Most superfund sites than any other region: Hudson River PCBs, Gowanus Canal and Netown Creek. Pompton Lakes, Ringwood and Passaic River.

NYS to submit No Discharge Zone Sewage Petitions for every major water body over the next two years. Encouraging NJ to do the same.

Green Infrastructure. Inserting in all sewage related enforcement work. Syracuse a standout. Working with NJ and NY to incentive green infrastructure via SRF.

PCBs in schools.

New York signed on to Chesapeake Bay TMDL.

Hydrofracking

Major enforcement case against Tonowanda Petroleum Coke facility, coupled with community-wide pollution prevention initiative.

Region 2 climate action plan.

Initiative to reduce pesticides in child care centers.

Puerto Rico:

No longer a high risk grantee

Participated in Presidential Task Force on Puerto Rico Status, getting EPA priority issues into final report.

Vieques Sustainability Task Force.

Martin Pena - major ej initiative.

US Virgin Islands:

Air Toxics Report to be released in July.

Major enforcement action against Hovensa Oil Refinery, including \$5 million SEP which will likely be used to establish a VI Center for Environmental Health.

Major enforcement actions on illegal sewage discharges.

VI Recycling Partnership

40th anniversary conferences were held in Puerto Rico, US Virgin Islands, New York and upcoming in October at Rutgers in NJ. Fantastic turn out at all 3. Attendance by Governors in Puerto Rico and US VI.

Internal:

More people of color in R2 leadership positions in the past year.

Diversity in hiring continues to be a challenge.

Energized staff.

Established shadowing program where staff spend a full week with RA, gaining a deeper understanding of the cross cutting work of the region.

Weekly "open door" hour when staff come by to talk about any issues, except personnel.

Challenges for the year ahead:

Contaminated sediment sites. Need a boost for environmentally sound innovative clean up technologies.

Vapor intrusion

Packaging reduction and marine debris. Big issue in coastal states. Sent memo to Mathy on need for national voluntary label on reduced packaging, similar to energy star.

Ramp up on PCBs in schools.

Lack of progress on RCRA corrective action sites.

Diminished state capacity.

EPA culture: working as a team, how to energize more staff, instill fiscal conservatism in spending even when hq is paying for items, etc.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LOWER PASSAIC RIVER STUDY AREA)
COOPERATING PARTIES GROUP,)

Plaintiff,)

v.)

Case No. 15-CV-7828 (JLL)(JAD)

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)

Defendant.)

SUPPLEMENTAL DECLARATION OF WALTER MUGDAN

I, Walter Mugdan, under penalty of perjury, affirm and declare that the following statements are true and correct to the best of my knowledge and belief and are based on my own personal knowledge or on information contained in the records of the United States Environmental Protection Agency (EPA) or on information supplied to me by EPA employees under my supervision and employees in other EPA offices.

1. I am the Director of the Emergency and Remedial Response Division (ERRD), EPA, Region 2 (Region 2). In the course of my duties I supervise ERRD staff. ERRD is the division within EPA Region 2 that is responsible for the development, implementation, and coordination of regional activities under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Superfund Amendments and Reauthorization Act. I also supervise ERRD's responses to requests submitted pursuant to the Freedom of Information Act (FOIA) seeking information related to ERRD's responsibilities.

2. The purpose of this declaration is to provide additional information describing EPA's

search for responsive information, and EPA's decision to withhold certain documents and redact portions of other documents, in response to four FOIA requests submitted by Robert La Gravenis on behalf of the Lower Passaic River Cooperating Parties Group (CPG) on April 21, 2014, April 28, 2014, May 14, 2014 and June 17, 2014, respectively. The FOIA requests all relate to the Diamond Alkali Superfund Site, and specifically, to the remedy selection process for the lower 8.3 miles of the Lower Passaic River (for ease of reference, this declaration will refer to this stretch of the river as the "Lower 8.3 Miles").

EPA's Search for Responsive Records

3. In my May 13, 2016 Declaration, I explained that the date range utilized to search for documents responsive to CPG's Second FOIA Request (FOIA EPA-R2-2014-006018) by Alice Yeh of my staff, working with Sarah Flanagan and Patricia Hick in the Office of Regional Counsel, was March 31, 2006, to February 10, 2014. EPA selected the March 31, 2006 start date because on or about March 31, 2006, Malcolm Pirnie, Inc., the subcontractor hired to perform technical work on the 17 Mile RI/FS and the FFS (as described in my May 13, 2016 declaration at ¶ 34), began work on a task, "Target Area Analysis," that would become part of the draft 2008 Conceptual Site Model (CSM), one of the two documents that were the focus of the Second FOIA Request. CSM analyses and results were used to develop the draft 2008 Empirical Mass Balance Model (EMBM); this began subsequent to the March 31, 2006 date. Thus, the March 31, 2006 date was selected as a conservatively early date on which to begin the search as responsive records did not likely exist before that date.

4. As detailed in my May 13, 2016 Declaration, EPA undertook good faith efforts to search for records responsive to the CPG's four FOIA requests. EPA Region 2 staff discussed with EPA contractors which documents or information in EPA's possession, prepared and submitted to

EPA by EPA's contractors, might be responsive to the sub-requests seeking technical data and information. Mugdan Decl. at ¶ 63. Region 2 staff determined that responsive information to the CPG FOIA Requests would likely be located in EPA staff work email accounts (both Lotus Notes and Outlook), or as electronic or paper documents in the possession of Region 2 staff. Mugdan Decl. at ¶¶ 64, 84, 102, 122-127.

5. The CPG's Third FOIA Request specifically requested that EPA search the personal email account of Regional Administrator Judith Enck. Due to this specific request, Region 2 staff reached out to Ms. Enck to ask her to search her personal email account. Mugdan Decl. at ¶¶ 104-106. Ms. Enck searched her personal email account and confirmed that she did not use her personal email account for communications regarding the Lower Passaic River Study Area with any members of the public. *Id.* at 106; Enck Declaration. The CPG did not specifically request that EPA search the personal email accounts of other EPA employees.

6. My staff has reviewed the documents referenced by the CPG as containing personal email account information. These documents consist of:

- Three emails from an EPA sub-contractor, John Kerns, who was not an EPA employee. These emails are numbered and described in EPA's *Vaughn* index as: FOIA_0601800008248 (Category 11: R2/Contractors Ex. 5 DP); FOIA_0601800008256 (Category 11: R2/Contractors Ex.5 DP); FOIA_0601800009090 (Category 9: EPA/Partners/Contractors Ex. 5 DP).
- Three emails from an EPA contractor with USACE-KC, Earl Hayter, who was not an EPA employee. These emails are numbered and described in EPA's *Vaughn* index as: FOIA_0601800007922 (Category 11: R2/Contractors Ex. 5 DP); FOIA_0601800007925 (Category 11: R2/Contractors [5768: R2/HQ-NRRB] Ex. 5 DP); FOIA_0601800007926 (Category 11: R2/Contractors [5768: R2/HQ-NRRB] Ex. 5 DP).
- Eight emails from an EPA sub-contractor, Craig Jones, who was not an EPA employee. These emails are numbered and described in EPA's *Vaughn* index as: FOIA_0601800008142 (Category 11: R2/Contractors Ex.5 DP); FOIA_0601800008143 (Category 11: R2/Contractors Ex. 5 DP); FOIA_0601800008182 (Category 11: R2/Contractors Ex.5 DP); FOIA_0601800008183 (Category 11: R2/Contractors Ex. 5

DP); FOIA_0601800008194 (Category 11: R2/Contractors Ex. 5 DP); FOIA_0601800008235 (Category 11: R2/Contractors Ex. 5 DP); FOIA_0601800009042 (Category 11: R2/Contractors Ex. 5 DP); FOIA_0601800009051 (Category 9: EPA/Partners/Contractors Ex. 5 DP).

- One email from an EPA employee, Eugenia Naranjo, which appears to have been sent from her EPA email account to her personal email account on August 8, 2007. This email consists of the employee's initial thoughts and comments on a draft document which she was reviewing, and is numbered and described in EPA's *Vaughn* index as: FOIA_0601800007232 (Category 10: R2 Ex.5 DP). This email, with the deliberative content redacted, is attached to this Declaration at Exhibit Y.
- One email from me, Walter Mugdan, which was sent to the Director of the Office of Site Remediation and Information Technology in EPA Headquarters, James Woolford, using my home computer on January 3, 2014. I included my EPA email account on this email, which was sent from a home computer due to inability to access EPA systems during a snow closure. This email contains my reactions and comments to another EPA employee's comments on the Proposed Plan, including my assessment of legal and litigation risks. It is numbered and described in EPA's *Vaughn* index as DASS00007971 (Category 1:R2/HQ-PP Technical w/ Atty Review Ex. 5 - Civil Privileges; Deliberative Process; Attorney Work Product). This email, with the deliberative and attorney work product content redacted, is attached to this Declaration at Exhibit Z.

7. As a general matter, I use only my epa.gov email account for communications related to official EPA business. In the rare instance when I have to use a personal email account, for example if the EPA system is inaccessible, I generally will copy my EPA email account so that any such communication is within the EPA system. Therefore, these communications would be available from searches of EPA email accounts.

8. Following extensive searches of EPA email accounts (both current and archived), EPA shared drives, EPA hard drives, and custodian searches for paper documents and notes, Region 2 staff determined that all locations reasonably likely to have responsive information had been searched. Mugdan Decl. at ¶¶ 67, 86, 109 and 127. The final number of responsive documents to all four FOIA requests was approximately 6,721 records, with approximately 4,257 released in

full, approximately 270 released with redactions, and approximately 2,191 withheld in full under one or more exemptions. *Id.* at 133.

EPA's Coded *Vaughn* Index and Application of Exemptions

9. The CPG, in its Response, makes various assertions about the insufficiency of EPA's Coded *Vaughn* Index and about EPA's application of exemptions. By agreement between the parties, the withheld documents are described by category and code in the Coded *Vaughn* Index and are individually listed. *See* Coded *Vaughn* Index and List of Withheld Documents, Mugdan Decl. Ex. X. A Supplement to the Coded *Vaughn* Index and List of Withheld Documents is attached to this Declaration at Exhibit AA. The Supplement contains additional information about the sender and recipient parties on email strings, additional information about EPA's distribution of the withheld material, and additional information about EPA's application of exemptions. *See* Suppl. *Vaughn*, Exhibit AA.

10. EPA applied Exemption 6 to withhold records in full or in part on the basis of personal privacy. Mugdan Decl. at ¶¶ 146-147. This includes records withheld within Categories 4, 5, 9, 11, 12, and 17 in EPA's Supplement to the Coded *Vaughn*. Records withheld in part under Exemption 6 consist of emails that contain either personal contact information or personal information such as discussions of doctor's appointments, child-care, vacation, and other use of personal time or leave. The withheld portions of emails relate to private information for individuals, the public disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The withheld information is within the scope of the phrase "personal and medical files and similar files" because the information applies to and is identified with a particular individual and is medical or personal in nature. There is no public interest in these

individuals' personal contact information, such as an email address, home phone number, or cell phone number. With respect to the personal contact information of EPA or other Federal employees, the withheld information does not shed light on the employee's performance of official duties. There is no public interest in these individuals' personal or medical information. There is also no public interest in the employee's child-care information, or use of personal leave time. The withheld information does not shed light on employee's performance of official duties, and in each instance, the harm to the individual as a result of disclosure clearly outweighs the public interest in such disclosure. Mugdan Decl. at ¶¶ 146 – 147; Suppl. *Vaughn* at Exhibit AA.

11. In addition, EPA withheld approximately 657 documents in full or in part under the Attorney-Client Privilege in Categories 1-11, 13, and 14. *See* Mugdan Decl. at ¶ 142; EPA Coded *Vaughn*. The withheld email chains were not circulated by EPA except to officials at EPA and other Agencies with a need to know, often under the Joint Prosecution and Confidentiality Agreement. EPA has provided a list of EPA attorneys who provided legal advice and review, which is attached as part of the Supplement to the Coded *Vaughn*, Exhibit AA.

12. The CPG has asserted that the CSM and EMBM were released in 2008, referring in a footnote to the fact that EPA provided the CSM and EMBM to peer reviewers in 2008. (CPG memo at p. 27). This is not an accurate description of the development of the draft CSM and EMBM, or the peer review process followed here. EPA released drafts of the CSM and EMBM in 2007, as part of an early draft Focused Feasibility Study (FFS) for the Lower 8.3 Miles. EPA continued to develop the draft CSM and EMBM, and released the 2008 drafts to its peer reviewers in May 2008. The peer reviewers, while external to EPA, were retained by the U.S. Army Corps of Engineers, Kansas City District, EPA's contractor, as subcontractors. EPA did

not release or provide the draft 2008 CSM and EMBM to members of the public, or other third parties.

13. After the peer review process, to address the comments received from the peer reviewers and as part of EPA's continued work on the FFS, EPA continued to develop the draft CSM and EMBM by incorporating new analyses, significantly restructuring the reports, and re-writing large sections of text. When the Proposed Plan for the Lower 8.3 Miles was released to the public in April 2014, EPA also released the final versions of the CSM and EMBM as elements of the Remedial Investigation/Focused Feasibility Study (RI/FFS) for the Lower 8.3 Miles. Chapter 6 of the RI and Appendix A (Data Evaluation Reports) contain elements that previously comprised the draft 2008 CSM. Appendix C (Mass Balance Modeling Analysis) is a final version of the EMBM. The Responsiveness Summary for the Lower 8.3 Mile ROD explains how EPA developed and updated the CSM and EMBM, until the release in 2014. The Responsiveness Summary is available online at p. 258 of the ROD:

<https://semspub.epa.gov/src/collection/02/AR63167> (See Responsiveness Summary, Responses II. D.1.1. and II.D.1.2, pages 63-66.)

14. In addition, there are pending or prospective law enforcement proceedings in this case. As discussed in my May 13, 2016 Declaration at ¶ 143, given the significant costs associated with the anticipated clean-up of the Lower Passaic River, EPA anticipates that some or all of the responsible parties will seek to challenge the remedy in federal court. In fact, New Jersey Department of Environmental Protection ("NJDEP") commenced litigation with responsible parties in 2005 related to the contamination of the Lower Passaic River and Newark Bay. This matter was removed to federal court in 2006, and subsequently remanded to New Jersey state court. *See New Jersey DEP v. Occidental Chemical Corp.*, 2006 US Dist. Lexis 71245 (D.N.J.

Sept. 28, 2006). This litigation grew to include over 300 third parties, including most if not all of the CPG members. Other litigation has included seven bankruptcy proceedings, each one including one or more potentially responsible parties for the Lower Passaic River Study Area, in which EPA filed proofs of claim for recovery of response costs incurred and to be incurred under CERCLA in connection with the Diamond Alkali Site:

- *In re Marcal Paper Mills, Inc.*, No. 06-21886 (MS) (District of New Jersey)
- *In re Kearny Industrial Associates, LP*, No. 07-10169 (NLW) (District of New Jersey)
- *In re Hercules Chemical Company, Inc.*, No. 08-25553 (MS) (District of New Jersey)
- *In re Lyondell Chemical Company*, No. 09-10023 (REG) (Southern District of New York)
- *In re Chemtura Corporation*, No. 09-11233 (REG) (Southern District of New York)
- *In re Motors Liquidation Company f/k/a General Motors Corporation*, No. 09-50026 (REG) (Southern District of New York)
- *In re Reichhold Holdings US Inc.*, No. 14-12237 (MFW) (District of Delaware)

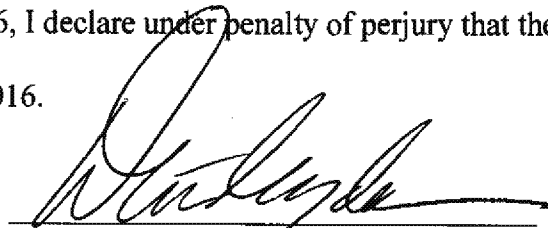
Members of the CPG, and/or the CPG collectively, have filed claims in many of these bankruptcy proceedings. Given the litigation involving potentially responsible parties that has already occurred, EPA reasonably anticipates that it may need to undertake enforcement, including litigation, in order to bring about the cleanup of the Lower 8.3 Miles and/or the 17 Miles.

15. The documents withheld under the deliberative process privilege (Exemption 5), are not purely factual in nature. The CPG has noted a number of documents (CPG memo, pp 29-30), the descriptions of which they say “suggest that EPA has improperly withheld” them. The presence of a fact, or the word “fact”, in the title of a document does not imply that the document is a simply an assemblage of facts. For example a document described as a “fact sheet” that is shared

within EPA (and with its partner agencies) can be understood to include information prepared by staff to explain opinions and advice on matters under consideration by EPA. Discussions, opinions or interpretations of technical matters and technical analyses, such as modeling and regression analysis, while scientific in nature, are also part of EPA's internal discussions as part of its decision-making process. Similarly, the documents withheld under Exemption 7A, while technical in nature, are actually draft technical documents under discussion as part of the deliberative process in finalizing the RI/FFS and Proposed Plan. EPA is not withholding final technical documents. I stated this in my original declaration in paragraph 141, discussing the documents withheld under the deliberative process privilege (Exemption 5), which includes all the documents withheld under Exemption 7A, and in paragraph 145.

16. In its memo, CPG lists several documents for which it asserts that EPA provided little information that would link a document factually to the claimed exemption. (CPG memo pp. 11 – 12.) Each of the documents in the CPG's first list is an attachment to a transmittal, or "parent" email. Of these transmittal emails, five are identified on the spreadsheet list of withheld documents in question (either the First FOIA Request or Second FOIA Request) attached to my May 13, 2016 Declaration as part of Exhibit X. These spreadsheet lists identify the withheld documents in serial order, so that attachments are listed after the parent email that identifies the attachment. The remaining transmittal emails were released by Region 2 and thus do not appear on the spreadsheet lists of withheld documents. EPA has correlated the attachments identified by the CPG on page 12 with the parent document in a table, attached as part of the Supplement to the Coded *Vaughn*. See Suppl. *Vaughn*, Exhibit AA.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on July 11, 2016.

A handwritten signature in black ink, appearing to read 'Walter Mugdan', is written over a horizontal line.

WALTER MUGDAN,
Director, EPA Region 2 ERRD

EXHIBIT Y

To: E. Naranjo (Ex. 6)
Cc: [REDACTED]
Bcc: [REDACTED]
From: CN=Eugenia Naranjo/OU=R2/O=USEPA/C=US
Sent: Wed 8/8/2007 7:10:59 PM
Subject:

Review of Appendix D: Empirical Mass Balance Model

GENERAL COMMENTS:

(b) (5)



EXHIBIT Z

I'm writing from my home computer, because I'm home (due to snow storm) and having some difficulty getting onto Outlook. I'm copying my work email address. Anyhow, we have some preliminary reactions to Steve's comments. They are shown in red, below:

(b) (5)

(b) (5)

(b) (5)



(b) (5)



EXHIBIT AA

Supplement to EPA's Coded *Vaughn* Index**Category 4: Communications and documents exchanged between Region 2 technical staff and EPA Headquarters technical staff that were subject to review by Region 2 attorneys and EPA Headquarters attorneys, related to the Proposed Plan and Focused Feasibility Study – 176 Documents****Documents Withheld in Full**

- Deliberative Process; Attorney Client; Withhold; Attorney Work Product – 58 Docs
- Deliberative Process; Attorney Client; Attorney Work Product; Ex. 6 – 3 Docs
- Deliberative Process; Attorney Client – 1 Doc
- Deliberative Process; Withhold; Attorney Work Product – 42 Docs
- Deliberative Process; Withhold – 59 Docs

Documents Released w/ Redactions:

- Deliberative Process; Attorney Work Product; Rel Redact – 4 Docs
- Deliberative Process; Rel Redact – 3 Docs

Documents Released in Full

- 7 Docs

Category 4 consists of documents responsive to sub-request #9 of the CPG's FOIA request. Sub-request #9 asked for any correspondence between Region 2 and Headquarters on draft versions of the Proposed Plan and Focused Feasibility Study documents. In late 2013 and early 2014, Region 2 submitted drafts of the Proposed Plan to EPA Headquarters for internal comment and review. EPA Headquarters staff reviewed the draft Proposed Plan and provided comments on Region 2's basis and explanation for selection of the preferred alternative; to evaluate conformance with EPA policies and guidance; and, where the Region had determined that an aspect of EPA guidance would not apply, to understand the basis for that determination.

EPA withheld all or part of 169 documents under Category 4. These documents consist of email communications exchanged between EPA Region 2 technical staff and EPA Headquarters technical staff, concerning attached documents that were subject to review by Region 2 attorneys and EPA Headquarters attorneys. These email communications and attached documents include comments and discussions of the aspects of the Proposed Plan for the lower 8.3 miles of the Lower Passaic River and the Focused Feasibility Study.

In particular, these documents detail issues that were of concern to Region 2 technical staff, and EPA Headquarters technical staff, as well as attorneys in both Region 2 and EPA Headquarters, in the development of the Proposed Plan. These concerns were frankly expressed and discussed in the documents in this category. Since these documents were subject to review by Region 2 and EPA Headquarters attorneys, they include communications that contain attorney views and advice on potential legal issues and litigation risks presented by the Proposed Plan and Focused Feasibility Study, and contain information that would reveal the Agency's process for development of proposed actions such as the Proposed Plan. Therefore, and as described in more detail below, these documents are protected under the deliberative process, attorney-client and attorney work product privileges.

The final Proposed Plan and Focused Feasibility Study for the lower 8.3 miles were released for public review and comment on April 11, 2014 and are part of the administrative record for the lower 8.3 miles of the Lower Passaic River / Diamond Alkali Superfund site. The documents withheld in Category D consist of the internal exchanges and drafts, including drafts with comments, between technical staff, seeking and responding to input or comments from EPA Region 2 attorneys and EPA Headquarters attorneys to develop and review the Proposed Plan.

Justification for Withholdings

The withheld email communications and attachments are deliberative because they contain the candid views of EPA Headquarters and Region 2 staff on the Proposed Plan, and Focused Feasibility Study. This draft material and the accompanying comments were circulated to EPA staff for input and comment prior to the finalization of the Agency's Proposed Plan and Focused Feasibility Study. This information is predecisional because it contains EPA staff's analysis, opinions, and recommendations related to the finalization of the Proposed Plan, and Focused Feasibility Study. This material includes communications between EPA Region 2 technical staff and Headquarters technical staff raising, for review by Agency attorneys, questions generated by drafts of the documents for discussion, providing editorial comments on the draft documents themselves, suggesting edits to draft documents for consideration by others, and otherwise engaging in the internal review process of the Proposed Plan, and Focused Feasibility Study documents. These email communications and related attachments are predecisional because they contain the opinions and questions of EPA technical staff which required legal review and input prior to the finalization of the documents.

The withheld information does not represent an official Agency decision or policy, and instead, the withheld information reflects comments, opinions, and views on options in development. The withheld documents were not circulated by the Agency outside the federal government. Release would have a chilling effect on the Agency's ability to have frank, internal discussions among its staff, including frank discussions with Agency attorneys in both the Office of Regional Counsel and Headquarters, about proposed Agency actions in advance of the final decision the Proposed Plan, and Focused Feasibility Study.

In addition, revealing these preliminary drafts and deliberations regarding the development of the drafts would create public confusion surrounding the reasons and rationales that were not in fact ultimately the grounds for the Agency's Proposed Plan for the lower 8.3 miles of the Lower Passaic River part of the Diamond Alkali Superfund Site or the Focused Feasibility Study. In addition, these documents were withheld because they contain legal advice and analysis protected under the Attorney-Client and Attorney Work Product Privileges. The 169 documents within Category 4 include emails and drafts of documents or sections of documents written by technical staff seeking and responding to comments and advice from Region 2 and Headquarters attorneys. These documents were prepared to support the issuance of the Proposed Plan and Focused Feasibility Study. They include technical staff's analysis of the hazardous substances in the sediment of the Passaic River, and the risk associated with those substances, as well as EPA Region 2's technical proposals for cleanup under its CERCLA

(Superfund) authority which required review and input from Agency attorneys as the information was developed into a final document. These documents incorporate legal advice from EPA attorneys to program staff and managers concerning the interpretation of CERCLA and its implementing regulations and guidance. The disclosure of such communications would deprive EPA staff, and the agency in general, of the benefit of confidential advice from EPA attorneys when developing a Proposed Plan, including guidance on the legal and regulatory adequacy of proposed remedies, as well as development of a Focused Feasibility Study and related Agency guidance.

Moreover, many of these documents contain information protected by the attorney work product privilege. The attorney work product privilege extends to documents prepared by an attorney, by the attorney's client, or a representative of the attorney or the attorney's client, in anticipation of litigation. These documents were prepared with the knowledge that litigation had already transpired in New Jersey state court related to the contamination in the Passaic River, and that EPA reasonably anticipated litigation after EPA issued the Record of Decision for the lower 8.3 miles of the river. As such, legal counsel in Region 2 and Headquarters have all been deeply involved in commenting on and directing changes to EPA staff's technical analyses, to ensure that the materials would be legally sufficient to withstand any challenge. Many of these materials may be used to support Region 2's enforcement against responsible parties, including the decision of whether to issue a notice letter to a party advising it of its legal responsibility for the site, and the decision to issue an order to one or more parties, and/or prepare a referral to DOJ, to file a complaint against one or more parties. All of these analyses require the selection and assessment of specific facts and data and are based on the mental impressions of EPA attorneys and staff working at these attorneys' direction. These attorneys direct staff to consider various factors to assist in refining their analysis, given these attorneys' understanding of CERCLA, the NCP and current case law. These technical analyses will form part of the basis for negotiation of an enforcement document with PRPs for the site, as well as EPA and DOJ's decision to file a civil judicial complaint should that be necessary. Release of the confidential information contained in such documents would allow external scrutiny of EPA's sensitive litigation preparations and deprive EPA attorneys of the ability to keep thoughts and mental impressions from discovery by an opponent in litigation.

The EPA performed a line-by-line review of the withheld material. Wherever possible, the Agency released all reasonably segregable information. In this category, the Agency released approximately seven documents with partial redactions. There is no additional reasonably segregable factual information to be released from this material. Factual information contained within these withheld documents was determined to be inextricably intertwined with the privileged information, and could not be reasonably segregated to be released under FOIA from the attorney-client information, attorney work product, predecisional and deliberative information. The final Proposed Plan, and Focused Feasibility Study, which were the subject of the discussion, comments, and review described in Category 4 are part of the administrative record for the Lower 8.3 Miles of the Lower Passaic River part of the Diamond Alkali Superfund site and are publicly available.

Supplemental Description of Exemption 6 Withholdings:

Finally, under Exemption 6, EPA withheld a portions of three records, all of which comprised an email chain encompassing, in part, personal information such as discussions of retirement, vacation, and other use of personal time or leave. The withheld portions of emails relate to private information for individuals, the public disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The withheld information is within the scope of the phrase “personal and medical files and similar files” because the information applies to and is identified with a particular individual and is medical or personal in nature. There is no public interest in these individuals’ personal or medical information. There is also no public interest in the employee’s retirement or use of personal leave time. The withheld information does not shed light on employee’s performance of official duties, and in each instance, the harm to the individual as a result of disclosure clearly outweighs the public interest in such disclosure.

The EPA performed a line-by-line review of the withheld material. Wherever possible, the Agency released all reasonably segregable information. There is no additional reasonably segregable factual information to be released from this material.

Category 12: Communications and draft documents, particularly drafts of technical documents and related communications and comments, circulated between technical staff in EPA Region 2 and technical staff in EPA Headquarters – 112 Docs.

Documents Withheld in Full

- 7a; Deliberative Process – 2 Docs
- Deliberative Process – 99 Docs
- Deliberative Process; Withhold; Ex. 6 – 1 Doc

Documents Released with Redactions

- Deliberative Process; Redact – 3 Docs

Documents Released in Full after Review

- 7 Docs

The EPA withheld 105 documents in full or in part under Category 12. Category 12 consists of draft technical documentation, such as draft tables, figures, and appendices and comments upon these draft materials which had been prepared by contractors for internal EPA review by EPA Headquarters staff in the Office of Solid Waste and Emergency Management (OSWER, now known as the Office of Land and Emergency Management, OLEM). This category includes the draft material that was circulated via email to the EPA-OSWER reviewers as well as email communications containing reviewer comments, discussion, evaluation and analysis of this draft material. The documents within this category were circulated by EPA Region 2 staff to EPA-OSWER staff for technical review and technical evaluation. The comments, communications, and suggestions incorporated within these documents were intended for EPA Region 2’s internal use to develop and evaluate the draft products and

supporting documents for the CSM, EMBM and the Proposed Plan. Documents within Category 12 were not circulated outside of the Agency.

Justification for Withholdings

The withheld material is deliberative because it contains the thoughts and opinions of EPA staff within EPA Region 2 and EPA-OSRTI, including EPA-OSRTI's review of draft documents and draft technical analyses performed to further develop the CSM and EMBM and the Proposed Plan for the underlying EPA action, and in the case of two documents includes discussions of a potential enforcement action. The circulated material was developed by EPA contractors and subcontractors in order to effectuate the selection of a proposed remedy in the form of the Proposed Plan for the Lower 8.3 Miles of the Lower Passaic River/Diamond Alkali Superfund site, and the communications in this category were developed to provide analytical technical evaluation and review of this material. This information is predecisional because it contains the early initial work and multiple iterations of draft products prepared in the course of developing the Proposed Plan for the Lower 8.3 Miles of the Lower Passaic River/Diamond Alkali Superfund site, including the thoughts, opinions, and analysis of the EPA-OSRTI reviewers on these draft products and their candid suggestions for improvements to be made to the Regional products.

The withheld information does not represent an official Agency decision or policy, and instead, the withheld information reflects the Agency's internal analysis, comments, and review of documentation prepared by EPA contractors and EPA staff to support the EPA's proposed actions for the Lower 8.3 Miles of the Lower Passaic River/Diamond Alkali Superfund site as part of an internal review process developed to improve the EPA's eventual decision. The withheld information does not represent an official Agency decision or policy and instead represents the Agency's internal thoughts, evaluation, and discussion of potential issues and technical changes to be made to draft versions of the CSM and EMBM in support of the Proposed Plan. The withheld material in Category 12 was part of the Agency's internal review process and was not circulated by the Agency. Release would have a chilling effect on the Agency's ability to have frank, internal discussions and candid review about proposed Agency actions in development, and would harm the Agency's ability to contract to receive highly technical advice and support from EPA staff. Release could also cause public confusion by disclosing reasoning and rationales that were not in fact the reasons for the Agency's eventual actions.

In addition to Exemption 5, two documents within Category 12 were also withheld under FOIA Exemption 7(A). Exemption 7(A) applies to records or information compiled for law enforcement purposes, the production of which could reasonably be expected to interfere with enforcement proceedings. The two emails withheld under Exemption 7(A) within Category 12 are part of the same email discussion, which contains sensitive discussions of the law enforcement history and potential effects of Agency action in part for the purpose of enforcing a cleanup selected under CERCLA for the Lower Passaic River. Release of these documents would reasonably be expected to interfere with enforcement proceedings, because it would hinder the government's ability to control or shape enforcement action should this be necessary in order to implement the cleanup selected for the Lower Passaic River, and would

prematurely reveal the government's evidence or strategy in an ongoing enforcement action.

The EPA performed a line-by-line review of these documents for segregability. Wherever possible, the Agency released all reasonably segregable information. In this category, approximately three documents were released with partial redactions. There is no remaining reasonably segregable factual information to be released from this material. Factual information contained within the withheld in full documents was determined to be inextricably intertwined with the privileged information, and could not be reasonably segregated to be released under FOIA from the attorney-client information, attorney work product, predecisional and deliberative information, and may interfere with law enforcement proceedings. The final Proposed Plan, Record of Decision, and administrative record for the Lower 8.3 Miles of the Lower Passaic River/Diamond Alkali Superfund site are publicly available.

Supplemental Description of Exemption 6 Withholding:

Finally, under Exemption 6, EPA withheld a portions of one record, which was an email chain encompassing, in part, personal information such as discussions of family, vacation, and other use of personal time or leave. The withheld portions of emails relate to private information for individuals, the public disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The withheld information is within the scope of the phrase "personal and medical files and similar files" because the information applies to and is identified with a particular individual and is medical or personal in nature. There is no public interest in these individuals' personal or medical information. There is also no public interest in the employee's retirement or use of personal leave time. The withheld information does not shed light on employee's performance of official duties, and in each instance, the harm to the individual as a result of disclosure clearly outweighs the public interest in such disclosure.

The EPA performed a line-by-line review of the withheld material. Wherever possible, the Agency released all reasonably segregable information. There is no additional reasonably segregable factual information to be released from this material.

Distribution of Attorney-Client Privileged Material

EPA withheld 657 documents in full or in part as attorney-client privileged communications. The documents withheld under this exemption contained confidential communications exchanged among Region 2 staff and attorneys as well as attorneys at EPA headquarters. In addition, the documents withheld included some exchanged between non-legal personnel, reflecting legal advice. Documents withheld in full or in part under the attorney-client privilege were kept confidential, and were not circulated to EPA except to officials at EPA and other agencies with a need to know, often under the Joint Prosecution and Confidentiality Agreement. A list of Agency attorneys who provided legal advice and review is included below.

Documents Listed in CPG's Memorandum of Law as Insufficiently Described

CPG lists several documents for which it asserts that EPA provided little information that would link a document factually to the claimed exemption. (CPG memo pp. 11 – 12.) Each of the documents in the CPG's first list is an attachment to a transmittal, or "parent" email.

Of these transmittal emails, five are identified on the EPA's Coded *Vaughn* Index of withheld documents attached to Walter Mugdan's May 13, 2016 Declaration as Exhibit X. The Coded *Vaughn* Index identifies the withheld documents in serial order by document number, so that attachments are listed after the parent email that identifies the attachment.

The remaining nine transmittal emails were released by Region 2 and thus do not appear on the lists of withheld documents. The following table is a correlation of the attachments identified by the CPG on page 12 of its memorandum of law with the parent document.

Attachment	Parent Email
DASS00000133	DASS00000131 (released in full as Bates number FOIA_05768_000280_0001)
DASS00000137	DASS00000136 (released in full as Bates number FOIA_05768_000283_0001)
DASS00000317	DASS00000316 (released in full as Bates number FOIA_05768_000299_0001)
DASS00000320	DASS00000319 (released in full as Bates number FOIA_05768_000300_0001)
DASS00001754	DASS00001753 (released in full as Bates number FOIA_05768_000025_0001)
DASS00003231	DASS00003230 (listed on EPA's <i>Vaughn</i> Index as withheld by Region 2, but released in full as a result of OGC QA as Bates number 5768_Release_001_000013_0001)
DASS00003289	DASS00003287 (on EPA's <i>Vaughn</i> Index)
DASS00003297	DASS00003296 (on EPA's <i>Vaughn</i> Index)
DASS00003437	DASS00003436 (on EPA's <i>Vaughn</i> Index)
DASS00007982	DASS00007981 (released in full as Bates number FOIA_05768_000119_0001)
DASS00007983	DASS00007981 (released in full as Bates number FOIA_05768_000119_0001)
DASS00007984	DASS00007981 (released in full as Bates number FOIA_05768_000119_0001)
DASS00008084	DASS00008083 (released in full as Bates number FOIA_05768_000050_0001)
FOIA_0601800002537	FOIA_0601800002536 (released in full as Bates number FOIA_06018_0000233_0001)
FOIA_06018_Outlook00000376	FOIA_06018_Outlook00000375 (listed on EPA's <i>Vaughn</i> Index as withheld by Region 2, but

	released in full as a result of OGC's QA as Bates number 6018 Release 001 000048 0001)
FOIA_06018_Outlook00000377	FOIA_06018_Outlook00000375 (listed on EPA's <i>Vaughn</i> Index as withheld by Region 2, but released in full as a result of OGC's QA as Bates number 6018 Release 001 000048 0001)
FOIA_06018_Outlook00000380	FOIA_06018_Outlook00000375 (listed on EPA's <i>Vaughn</i> Index as withheld by Region 2, but released in full as a result of OGC's QA as Bates number 6018 Release 001 000048 0001)
FOIA_06018_Outlook00000381	FOIA_06018_Outlook00000375 (listed on EPA's <i>Vaughn</i> Index as withheld by Region 2, but released in full as a result of OGC's QA as Bates number 6018 Release 001 000048 0001)
FOIA_06018_Outlook00000483	FOIA_06018_Outlook00000482 (released in full as Bates number FOIA_06018_0000646_0001)
FOIA_06018_Outlook00000484	FOIA_06018_Outlook00000482 (released in full as Bates number FOIA_06018_0000646_0001)

List of Attorneys Included in Responsive Documents with Office and Title

EPA Region 2	Title
Eric Schaaf	Regional Counsel
Delmar Karlen	Branch Chief
Patricia Hick	Staff Attorney
Amelia Wagner	Staff Attorney
Sarah Flanagan	Staff Attorney
Virginia Capon	Section Chief
Marla Wieder	Staff Attorney
Deborah Mellott	Section Chief
Patricia Hick	Staff Attorney
Kedari Reddy	Staff Attorney
Amelia Wagner	Staff Attorney

EPA Headquarters	Title
Barry Breen	Deputy Assistant Administrator, Office of Solid Waste and Emergency Remediation
Avi Garbow	General Counsel, Office of General Counsel
Bicky Corman	Deputy General Counsel, Office of General Counsel

Mary Kay Lynch	Associate General Counsel, Solid Waste and Emergency Response Law Office
John Michaud	Deputy Associate General Counsel, Solid Waste and Emergency Response Law Office
Earl Salo	Attorney-Advisor, Solid Waste and Emergency Response Law Office
Charles Openchowski	Attorney-Advisor, Solid Waste and Emergency Response Law Office
Cynthia Giles	Assistant Administrator, EPA Office of Enforcement and Compliance Assurance
Lawrence Starfield	Principal Deputy Assistant Administrator, EPA Office of Enforcement and Compliance Assurance
Rafael DeLeon	EPA Office of Enforcement and Compliance Assurance, Deputy Director (Acting), Office of Site Remediation Enforcement
Kenneth Patterson	EPA Office of Enforcement and Compliance Assurance, Office of Site Remediation Enforcement, Director, Regional Support Division
Benjamin (Ben) Lammie	EPA Office of Enforcement and Compliance Assurance
Karin Leff	EPA Office of Enforcement and Compliance Assurance
Brian Thompson	EPA Office of Enforcement and Compliance Assurance
Deniz Ergener	EPA Office of Enforcement and Compliance Assurance
Meredith Fishburn	EPA Office of Enforcement and Compliance Assurance

New Jersey Department of Environmental Protection (NJDEP)	Title
John Dickinson	Deputy Attorney General

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LOWER PASSAIC RIVER STUDY AREA
COOPERATING PARTIES GROUP,

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY,

Defendant.

HON. JOSE L. LINARES

Civil Action No. 15-CV-7828 (JLL) (JAD)

RESPONSE TO PLAINTIFF'S LOCAL CIVIL RULE 56.1
STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to Civil Rule 56.1 of the Local Rules of the United States District Court for the District of New Jersey, defendant U.S. Environmental Protection Agency ("EPA" or "the Agency"), by its attorney, Paul J. Fishman, the United States Attorney for the District of New Jersey, responds to plaintiff's Local Civil Rule 56.1 Statement of Material Facts as follows:

FOIA Request No. 1 – EPA-R2-2014-005768 (April 21, 2014)

1. Defendant admits that plaintiff submitted a FOIA Request with EPA Region 2 on April 21, 2014. Defendant denies plaintiff's characterization of the request because the document speaks for itself and is the best evidence of its contents.

2. Defendant admits the allegations in this paragraph.

3. Defendant admits that plaintiff, through counsel, submitted a letter to the Assistant Regional Counsel for EPA Region 2 dated June 17, 2014. Defendant denies plaintiff's characterization of plaintiff's communications with defendant, including the referenced letter, which speaks for itself and is the best evidence of its contents.

4. Defendant admits that it completed its response to FOIA request EPA-R2-2014-005768 on or around October 10, 2014. *See* Declaration of Walter Mugdan ("Mugdan Decl.") ¶ 75. Defendant denies plaintiff's characterization of the referenced letter, because the document speaks for itself and is the best evidence of its contents.

5. Defendant denies plaintiff's characterization of the elements of the request, because the document speaks for itself and is the best evidence of its contents. Defendant denies plaintiff's characterizations of defendant's response to FOIA Request EPA-R2-2014-005768. See Mugdan Decl. ¶ 76.

6. Defendant admits the allegations in this paragraph.

7. Defendant admits the allegations in this paragraph.

8. Defendant admits the allegations in this paragraph.

9. Defendant admits the allegations in this paragraph.

FOIA Request No. 2 – EPA-R2-2014-006018 (April 28, 2014)

10. Defendant admits that plaintiff submitted a FOIA Request with EPA Region 2 on April 28, 2014. Defendant denies plaintiff's characterization of the request because the document speaks for itself and is the best evidence of its contents.

11. Defendant admits that plaintiff, through counsel, submitted a letter to the Assistant Regional Counsel for EPA Region 2 dated June 17, 2014. Defendant denies plaintiff's

characterization of plaintiff's communications with defendant, including the referenced letter, which speaks for itself and is the best evidence of its contents.

12. Defendant admits that it completed its response to FOIA request EPA-R2-2014-006018 on or around January 5, 2015. See Mugdan Decl. ¶ 93. Defendant denies plaintiff's characterization of defendant's response letter, because the document speaks for itself and is the best evidence of its contents.

13. Defendant denies plaintiff's characterization of defendant's response. See Mugdan Decl. ¶¶ 94-95.

14. Defendant denies plaintiff's characterization of defendant's response. See Mugdan Dec. ¶¶ 94-95; Ex. X (Coded *Vaughn* Index and List of Withheld Documents).

15. Defendant admits the allegations in this paragraph.

16. Defendant admits the allegations in this paragraph.

17. Defendant admits the allegations in this paragraph.

18. Defendant admits the allegations in this paragraph.

FOIA Request No. 3 – EPA-R2-2014-006476 (May 14, 2014)

19. Defendant admits that plaintiff submitted a FOIA Request with EPA Region 2 on May 14, 2014. Defendant denies plaintiff's characterization of the request because the document speaks for itself and is the best evidence of its contents.

20. Defendant admits the allegations in this paragraph.

21. Defendant admits that plaintiff submitted an Amended Appendix A to FOIA Request EPA-R2-2014-006476 on or around May 15, 2015. Defendant denies plaintiff's characterization of the request, because the document speaks for itself and is the best evidence of its contents.

22. Defendant admits that plaintiff, through counsel, submitted a letter to Assistant Regional Counsel for EPA Region 2 dated June 17, 2014. Defendant denies plaintiff's characterization of plaintiff's communications with defendant, including the referenced letter, which speaks for itself and is the best evidence of its contents.

23. Defendant admits that plaintiff, through counsel, submitted a letter EPA dated November 4, 2014. Defendant denies plaintiff's characterization of plaintiff's communications with defendant, including the referenced letter, which speaks for itself and is the best evidence of its contents.

24. Defendant admits that on or around November 13, 2014, defendant responded to plaintiff's letter dated November 4, 2014. Defendant denies plaintiff's characterization of the letter which speaks for itself and is the best evidence of its contents.

25. Defendant admits that it completed its response to FOIA request EPA-R2-2014-006476 on or around March 20, 2015. See Mugdan Decl. ¶ 118. Defendant denies plaintiff's characterization of defendant's response letter, because the document speaks for itself and is the best evidence of its contents.

26. Defendant denies plaintiff's characterizations of defendant's response to FOIA Request EPA-R2-2014-006476. See Mugdan Decl. ¶ 119. Moreover, defendant denies the plaintiff's characterization of the request, because the document speaks for itself and is the best evidence of its contents.

27. Defendant denies that Paragraph 27 states a material fact.

28. Defendant denies that Paragraph 28 states a material fact.

29. Defendant denies plaintiff's characterizations of Ms. Enck's emails, which speak for themselves and are the best evidence of their contents.

30. Defendant denies the allegations in this paragraph. See Declaration of Judith Enck ¶¶ 5-7.

31. Defendant admits the allegations in this paragraph.

32. Defendant admits the allegations in this paragraph.

33. Defendant admits the allegations in this paragraph.

FOIA Request No. 4 – EPA-R2-2014-007546 (June 17, 2014)

34. Defendant admits that plaintiff submitted a FOIA Request with EPA Region 2 on June 17, 2014. Defendant denies plaintiff's characterization of the request because the document speaks for itself and is the best evidence of its contents.

35. Defendant admits the allegations in this paragraph.

36. Defendant admits that plaintiff, through counsel, submitted a letter to Assistant Regional Counsel for EPA Region 2 dated June 17, 2014. Defendant denies plaintiff's characterization of plaintiff's communications with defendant, including the referenced letter, which speaks for itself and is the best evidence of its contents.

37. Defendant admits that on or around June 19, 2014, defendant responded to plaintiff's letter dated June 17, 2014. Defendant denies plaintiff's characterization of the letter which speaks for itself and is the best evidence of its contents.

38. Defendant admits that on or around November 13, 2014, defendant responded to plaintiff's letter dated November 4, 2014. Defendant denies plaintiff's characterization of the letter which speaks for itself and is the best evidence of its contents.

39. Defendant denies plaintiff's characterization of its response. See Mugdan Decl. ¶ 120.

40. Defendant admits the allegations in this paragraph.

41. Defendant admits the allegations in this paragraph.

Dated: Newark, New Jersey
July 15, 2016

PAUL J. FISHMAN
United States Attorney

By: s/Kristin L. Vassallo
KRISTIN L. VASSALLO
Assistant United States Attorney

CERTIFICATE OF SERVICE

I, Kristin L. Vassallo, Assistant United States Attorney for the District of New Jersey, hereby certify that on July 15, 2016, the foregoing Reply Memorandum of Law, Declaration of Judith Enck (with exhibit), Supplemental Declaration of Walter Mugdan (with exhibits), and Response to Plaintiff's Local Civil Rule 56.1 Statement of Material Facts Not in Dispute, were emailed served on opposing counsel via the ECF system. In addition, a hard copy will be sent by first-class mail to:

Justin D. Smith, Esq.
Shook Hardy & Bacon LLP
2555 Grand Boulevard
Kansas City, MO 64108

Dated: Newark, New Jersey
July 15, 2016

/s/ Kristin L. Vassallo
KRISTIN L. VASSALLO
Assistant United States Attorney